indicated by us in the *Malaysian Bar* case,[1] to attain constitutional validity in this type of legislation, it is sufficient if the classification made by the statute has a governmental purpose. In this particular case, we are of the opinion that the appellant has satisfied us that the classification in the Act has a reasonable governmental purpose, and consequently, the restriction imposed must be held to be constitutionally valid.

On the second issue, we do not comprehend the argument on art 147(1) which provides:

> The law applicable to any pension, gratuity or other like allowance (in this Article referred to as an 'award') granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.

The provision of art 147(1) guarantees the additional pension benefits to the respondent only if the Act is applicable to him. Since it is not applicable to him, that would be the end of the matter.

For the reasons given, we allow the appeal with costs and set aside the order of the learned trial judge.

Appeal allowed.

Solicitors: *GT Rajan & Co.*

Reported by *Prof Ahmad Ibrahim*

United Malayan Banking Corp Bhd v Tan Lian Keng & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22(23)-287-87
EDGAR JOSEPH JR J
8 NOVEMBER 1989

Evidence — Extrinsic evidence adduced — Whether admissible — Evidence of negotiations as 'matrix of fact' — Evidence Act 1950, ss 91 & 92

Civil Procedure — Summary judgment — Triable issues — Rules of the High Court 1980, O 14

This was an application for summary judgment under O 14 of the Rules of the High Court 1980 arising out of an action by the plaintiffs, a bank, against the defendants seeking enforcement of a contract of guarantee and indemnity dated 24 August 1982. In pursuance of the said guarantee and indemnity the plaintiffs had granted banking facilities to Butterworth Marketing Consultant Sdn Bhd ('the company') which amounted to $1,221,505.20 at the date of commencement of the action. In the event, the company was wound up and the plaintiffs commenced the action herein.

The defendants contended that notwithstanding the terms and conditions of the guarantee and indemnity arising from representations made by the plaintiffs' manager to the defendants, there had been 'an understanding' that the plaintiffs would only proceed against the defendants for any sums due and owing by the company to the plaintiffs after the plaintiffs had taken action against the company by enforcing a charge executed as security for the banking facilities.

Held, allowing the plaintiffs' application:

(1) The Evidence Act 1950, by s 91, excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance with or in contradiction of or in addition to or in substraction of the terms of a document.

(2) Even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construe the agreement.

(3) The effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss 91 and 92.

(4) Even if such extrinsic evidence is admissible, there is nothing to suggest that the manager concerned possessed actual or ostensible authority to make the representations alleged on behalf of the plaintiffs so that even if such representations had been made it would not have been binding upon the plaintiffs.

Cases referred to

1 *Mok Hin Wah & Ors* v *UMBC* [1987] 2 MLJ 610 (refd)
2 *Lesco Development Corp Sdn Bhd* v *Malaysia Building Society Bhd* [1988] 2 MLJ 184 (refd)
3 *John Pym* v *Robert Campbell & Ors* (1856) 119 ER 903 (refd)
4 *Tyagaraja Mudaliyar & Anor* v *Vedathanni* AIR 1936 PC 70 (refd)
5 *Secured Income Real Estate (Australia) Ltd* v *St Martins Investments Pty Ltd* (1979) 144 CLR 596 (refd)

6 *Arrale* v *Costain Civil Engineer* [1976] 1 Lloyd's Rep 98 (not follid)
7 *The 'Karen Oltmann'* [1976] 2 Lloyd's Rep 708 (not follid)
8 *Malaysian International Merchant Bankers Bhd* v *G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471 (refd)

Legislation referred to
Evidence Act 1974 ss 91, 92
Rules of the High Court 1980 O 14

Johari bin Ahmad for the plaintiffs.
Ooi Teik Hoe for the defendants.

Cur Adv Vult

Edgar Joseph Jr J: This was an application for summary judgment under O 14 of the Rules of the High Court 1980 arising out of an action by the plaintiffs, a bank, against the defendants seeking enforcement of a contract of guarantee and indemnity dated 24 August 1982 whereby, in consideration of the plaintiffs granting to the Butterworth Marketing Consultant Sdn Bhd, their customer, certain banking facilities, that is to say, (a) a secured overdraft up to $50,000; (b) letters of credit/trust receipts up to $1,350,000; (c) a fixed loan of $100,000; (d) a clean overdraft against outport cheques amounting to $50,000; and (d) bank acceptances for $100,000, amounting in all to $1,650,000, the defendants who were directors of the customer, had covenanted to pay all sums due, costs and charges payable by the customer.

In pursuance of the said guarantee and indemnity, the plaintiffs had granted the banking facilities aforesaid to the customer which, together with interest, commission and bank charges, amounted to $1,221,505.20, at the date of commencement of the action. In the event, the customer company was wound up, and the plaintiff commenced the action herein alleging in the affidavit filed in support of the application for summary judgment that there was no defence to the action and that the appearance filed was merely to obtain delay.

Before me, counsel for the defendants took two points. In the first place, it was contended that the action herein was premature in that no notice of demand for the recovery of the amounts aforesaid had been served upon the defendants. The case of *Mok Hin Wah & Ors* v *UMBC*[1] was cited in support. Counsel for the plaintiffs replied (without challenge by counsel for the defendants) that although nowhere in the affidavit filed in support of the application for summary judgment was any mention made of the fact that a notice of demand had been served upon the defendants, the true position was that there had been such service and he undertook to file an affidavit to repair the omission.

In the circumstances, I accepted the statement from the Bar by counsel for the plaintiffs, and saw nothing in the point. I would add that counsel for the plaintiffs did subsequently file a supplementary affidavit affirmed to on 6 April 1989 (encl 18) exhibiting the notice of demand which had been duly served upon the defendants.

In the second place, it was submitted by counsel for the defendants that notwithstanding the terms and conditions of the guarantee and indemnity, arising from representations made by the plaintiffs' manager to the defendants there had been 'an understanding' that the plaintiff would only proceed against the defendants for any sums due and owing by the customer to the plaintiffs after the plaintiff had taken action against the customer company by enforcing a charge executed as security for the banking facilities aforesaid. The case of *Lesco Development Corp Sdn Bhd* v *Malaysia Building Society Bhd*[2] was cited in support.

In my opinion, the Evidence Act 1950, by s 91 excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance or in contradiction or in addition or in substraction of the *terms* of a document. (Emphasis added.)

The English case of *John Pym* v *Robert Campbell & Ors*[3] provides a good illustration of the provisions of ss 91 and 92. In that case, Erle J said at p 904:

> The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional and if that had been so it would have been wrong. But I am of the opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement, and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence ... but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. *The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.* (Emphasis supplied.)

The law in India on this point (with which ours is in pari materia) is the same as that in England and this appears from the judgment of Sir John Wallis who, when speaking for the Judicial Committee of the Privy Council in *Tyagaraja Mudaliyar & Anor* v *Vedathanni*,[4] referred with approval to the above passage in the judgment of Erle J.

I hasten to add that from time to time the attempt is made to adduce evidence of negotiations on the ground that it is part of 'the matrix of fact'. The temptation to do so ought to be resisted. So, for example, in *Secured Income Real Estate (Australia) Ltd* v *St Martins Investments Pty Ltd*,[5] the purchasers of an office block were liable to make certain payments if the income from leases of parts of the block produced a certain amount. The vendors offered to

take leases in order to make up the shortfall in income. The purchasers sought to adduce evidence that in the course of negotiations both parties had 'commercial' leases in mind. Manson J said at p 606:

> This was said to be evidence of surrounding circumstances to which recourse could be had in interpreting the contract. In truth, the evidence is not evidence of surrounding circumstances; it is evidence of antecedent oral negotiations and expectations of the parties and as such it cannot be used for the purpose of construing the words of a written contract intended by the parties to comprehensively record the terms of the agreement which they have made.

Exceptionally, even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construe the agreement. Naturally, this is difficult to achieve in practice.

In *Arrale* v *Costain Civil Engineer*,[6] Stephenson LJ suggested that evidence of negotiations could be admitted in order to clarify ambiguities. This suggestion was followed by Kerr J in *The 'Karen Oltmann'*[7] in the following terms:

> If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is being alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the word as the result of their common intention.

In the present case, the contract of guarantee and indemnity contains no ambiguity. Indeed, its provisions are crystal clear and comprehensive.

To revert to the specific issue before me, it is my opinion that the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss 91 and 92.

If, contrary to my primary opinion such extrinsic evidence is admissible, there is nothing to suggest that the manager concerned possessed actual or ostensible authority to make the representations alleged on behalf of the plaintiffs so that even if such representations had been made it would not have been binding upon the plaintiffs. It is noteworthy that nowhere in the affidavits filed on behalf of the defendants or even during the argument was such authority alleged.

It follows that, the contract of guarantee and indemnity does not require the plaintiffs to first take action against the customer by enforcing the charge before proceeding against the defendants. (See *Malaysian International Merchant Bankers Bhd* v *G & C Securities Sdn Bhd.*[8])

In the circumstances, I was satisfied that there was no defence to the action worth listening to and so I made an order in terms of the application against all the defendants.

Application allowed.

Solicitors: *Johari Ahmad & Tan; Ooi Lee & Co.*

Reported by *Kevin Mathews*

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO D1-42-577-1987
VC GEORGE J
3 NOVEMBER 1989

Companies and Corporations — Winding up — Application to set aside petition — Whether petitioner qualified to present petition — Debt disputed on substantial grounds — Company's liability to petitioner the subject of pending proceedings in another jurisdiction — Companies Act 1965, s 217(1)

The petitioner was the guarantor of a loan made to a company. The agreement between the parties, pursuant to which the guarantee had been provided, stated that if the petitioner informed the company that the lender required the petitioner to pay the amount guaranteed, the company should on demand pay this amount to the petitioner. At the petitioner's request, the lender sent a written demand to the petitioner for repayment of the loan. The petitioner in turn served the company with a statutory demand for payment and upon the company's failure to pay, presented a petition for winding up. The company applied for the petition to be set aside as the alleged debt was disputed on substantial grounds, namely: (a) the demand made by the lender to the petitioner was improper and invalid as it was made only at the petitioner's request; (b) there was in existence an agreement, entered into with the petitioner's consent, which created a moratorium in respect of loans to the company.

Held, allowing the company's application:

(1) In a creditor's petition for a winding-up order, the petitioner has to satisfy the court that it is indeed a creditor and as such, a qualified person to present the petition and that a ground for winding up exists.

(2) The petition is based on a debt to which the petitioner claims to be immediately and unconditionally entitled. This is confirmed by the statutory demand having been made. A debt which will become payable only at some time in the future is not capable of being made the subject of a statutory demand.

(3) The effect of the company's contentions amounts to there being a dispute on substantial grounds as to whether the petitioner is a creditor qualified to present the petition. Further, as the issue of whether the company is liable to the petitioner is the subject of a contested action in the High Court of Singapore, which was pending at the date of presentation of the petition, the petition ought to be set aside or stayed pending the disposal of these issues. The company court is not a suitable forum for the adjudication of such controversial issues.